No. 82-1024

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE BOEING COMPANY,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Claims (Now Merged into the United States Court of Appeals for the Federal Circuit)

BRIEF *AMICUS CURIAE* OF THE AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.

Of Counsel
WILNER & SCHEINER
Suite 300
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 861-7800

MORTON H. WILNER *
General Counsel
Aerospace Industries
Association of America, Inc.

MARSHAL L. COLE
Associate General Counsel
Aerospace Industries
Association of America, Inc.

Suite 300
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 861-7810
Attorneys for Amicus Curiae

* Counsel of Record

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Pursuant to Rule 36 of the Rules of this Court and with the written consent of counsel for both parties,[1] The Aerospace Industries Association of America, Inc. ("AIA"), respectfully files this brief *amicus curiae* in support of petitioner, The Boeing Company ("Boeing").

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[1] Letters of consent have been filed with the Clerk.

INTEREST OF THE *AMICUS CURIAE*

AIA is the national trade association representing forty-seven United States companies which are engaged in the research, development and manufacture of such aerospace systems as aircraft, missiles, spacecraft, and space launch vehicles; propulsion, guidance, and control systems for flight vehicles; and a variety of airborne and ground-based equipment essential to the operation of the flight vehicles. The industry AIA represents is one of the nation's largest. Its sales in 1981 amounted to $63.5 billion, including $52.9 billion in sales of aerospace products and services and $10.6 billion in nonaerospace products.

The Court of Claims in this case declined to reach the merits of Boeing's challenge under the Appointments Clause, U.S. Const., Art. II, § 2, cl. 2, to the Cost Accounting Standards Board ("CASB") and its promulgated standards, including Cost Accounting Standard 403 ("CAS 403"), 4 C.F.R. § 403 (1981). The court held that the CASB's standards were valid because the "Department had the independent authority to accept the standard on its own." Alternatively the court held that the CASB's members, even if unconstitutionally appointed, were "*de facto* officer[s]" whose acts were valid. *Boeing Co. v. United States*, 680 F.2d 132, 141 (1982) (Petitioner's Appendix ("Pet. App.") at A-16).

The decision of the Court of claims not to consider Boeing's Appointments Clause challenge to the CASB and its standards is of major consequence to the aerospace industry. AIA members furnish a broad range of supplies and services to the Department of Defense and other government agencies responsible for defense contracts, acting as both prime contractors and subcontractors. Pursuant to 50 U.S.C. app. § 2168 (1976), generally, defense contractors and subcontractors for negotiated

prime contracts in excess of $100,000 must comply with the CASB standards and, in fact, the CASB standards must be incorporated into all significant defense contracts as contract terms. *See* 4 C.F.R. § 331.20(a).[2]

Even before the Court of Claims issued its decision, there was a widely held perception that the CASB was unconstitutional.[3] By acknowledging that Boeing's argument was "by no means insubstantial," 680 F.2d at 141, Pet. App. A-15, but declining to rule on it, the Court of Claims has added to this perception and created further uncertainty. Resolution of this question is necessary to create certainty and promote reliance and uniformity as to contract terms in the government contract process.

The questions raised by Boeing's Appointments Clause challenge to the CASB and its promulgated standards are thus of interest to all those involved in defense procurement contracts.

The uncertainty left by the Court of Claims decision over the constitutionality of the CASB and its standards and over the authority of the Defense Department and other federal agencies with respect to the CASB's standards, unless resolved by this Court, will adversely affect the timely and efficient procurement of defense products and services.

SUMMARY OF ARGUMENT

Because the members of the CASB were not appointed in accordance with the Appointments Clause of the Constitution, the CASB could not constitutionally perform

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[2] The standards promulgated by the CASB "still have the full force and effect of law," and they remain effective, binding departments and contractors despite the lack of any agency empowered to review them. Senate Comm. on Banking, Housing, and Urban Affairs, Defense Production Act Extension of 1982, S. Rep. No. 412, 97th Cong., 2d Sess. 2 (1982).

[3] See Boeing Petition, page 9, note 4.

the rulemaking functions vested in it by Congress, and the CASB's standards are therefore invalid. Contrary to the holding by the Court of Claims, the CASB's enabling act and the Defense Department's adoption of the CASB's standards make clear that the Defense Department did not have or exercise any independent authority but rather was required by law to adopt the CASB's standards. The Court of Claims improperly invoked the "*de facto* officer" doctrine and an assertion of "nonretroactivity" in support of its refusal to reach the merits of Boeing's constitutional claim.

ARGUMENT

THE COURT OF CLAIMS ERRED BY REFUSING TO REACH THE MERITS OF BOEING'S APPOINTMENTS CLAUSE CLAIM.

Congress authorized the CASB to promulgate cost accounting standards binding on the Department of Defense and on national defense contractors and subcontractors. *See* 50 U.S.C. app. § 2168(g). In so doing, Congress vested the CASB with executive powers and duties beyond those merely in aid of the legislative function, thus making the CASB members "officers of the United States" who must be appointed in accordance with the Appointments Clause of the Constitution. *Buckley v. Valeo*, 424 U.S. 1, 118-19 (1976); *Humphrey's Executor v. United States*, 295 U.S. 602, 625-26 (1935). Because the members of the CASB were not appointed in this manner, the agency could not constitutionally perform the rulemaking functions vested in it by Congress. *See Buckley, supra*, at 143. The CASB's appointment and therefore its promulgation of standards violated the fundamental constitutional principle of separation of powers.

In refusing to consider Boeing's claim, the Court of Claims held that "the Department of Defense itself adopted CAS 403 and that the Department had the inde-

pendent authority to accept the standard on its own." 680 F.2d at 141, Pet. App. at A-16. This is incorrect. The Cost Accounting Standards Act provides that the CASB's standards "*shall* be used by *all* relevant Federal agencies and by defense contractors and subcontractors." 50 U.S.C. app. § 2168(g) (Emphasis added.). In addition, the Defense Department in *Defense Procurement Circular No. 99* acknowledged that it was required to apply the CASB's standards, effectively negating any inference that it was publishing the Cost Accounting Standards as an action independent of the CASB. (Pet. App. at F-68.)

The Court of Claims invoked the "*de facto* officer" doctrine and an assertion of "nonretroactivity" in support of its refusal to reach the merits of Boeing's constitutional claim. AIA believes that the "*de facto* officer doctrine" should not have been applied to prevent the consideration of Boeing's serious constitutional claim here. *See Glidden Co. v. Zdanok*, 370 U.S. 530 (1962); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963). The Court of Claims erroneously relied on *Buckley v. Valeo*, *supra*, to support its application of the "*de facto* officer doctrine." But in *Buckley*, this Court decided and did not avoid reaching the merits of petitioners' Appointments Clause claim, as the Court of Claims should have done here.

The Court of Claims also erred in suggesting that an assertion of "nonretroactivity" would support its refusal to decide the constitutional question. Whether a decision on a constitutional claim is to be given retroactive or prospective-only effect should be decided after a decision on the merits. The question of retroactivity should not be used to avoid reaching the merits of a constitutional claim.

CONCLUSION

AIA urges that the Court grant Boeing's petition for certiorari and that the decision of the Court of Claims, insofar as it refused to reach the merits of Boeing's Appointments Clause challenge, be reversed for the foregoing reasons.

Respectfully submitted,

MORTON H. WILNER *
General Counsel
Aerospace Industries
Association of America, Inc.

MARSHAL L. COLE
Associate General Counsel
Aerospace Industries
Association of America, Inc.

Suite 300
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036
Attorneys for Amicus Curiae

* Counsel of Record